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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRIAN M. FREEMAN,

Petitioner,

—v.—

MOIRA JOHNSTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Moira Johnston ("Johnston") files this brief in opposition to the petition of petitioner Brian M. Freeman ("Freeman") for a writ of certiorari. The decision below by the New York State Court of Appeals does not in any way conflict with the decision of another state court of last resort or of a United States Court of Appeals. Nor did the court below decide an important, yet unsettled, question of federal law or decide a federal question which conflicts with decisions of this Court. Freeman unsuccessfully attempts in his Petition to create some kind of new constitutional test based on a factual premise which was decided adversely to him by a unanimous New York State Court of Appeals and by three of our four judges at the New York

intermediate appellate court. There is no conceivable basis for this Court to redefine the "actual malice", constitutional standard as interpreted by this Court in Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) and in Masson v. New Yorker Magazine, Inc., ___ U.S. ___, 111 S.Ct. 2419 (1991). The petition for a writ of certiorari should accordingly be denied.

STATEMENT

The New York Court of Appeals has disposed of the instant libel suit on the well-recognized basis of the absence of constitutional malice as a matter of law. Freeman v. Johnston, 84 N.Y.2d 52, 57, 614 N.Y.S.2d 377, 379 (1994). Alternatively, the court below found, on the common law, non-constitutional ground, that the statement complained of by Freeman is not defamatory of him. (Id.)

This Court, pursuant to its own Rule 10, will grant a petition for a writ of certiorari "only when there are special and important reasons therefore." (Emphasis supplied.) See Rice v. Sioux City Memorial Park Cemetery, Inc., 348 U.S. 70, 74 (1955) ("'Special and important reasons' imply a reach to a problem beyond the academic or the episodic.") In particular, a petition may be granted only when a state court of last resort has decided a federal question in a way that conflicts either with a decision of another state court of last resort or a United States Court of Appeals. (Rule 10.1(b)). A petition may also be granted when a state court "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with

applicable decisions of this Court." (Rule 10.1(c)).

Freeman seeks to have this Court consider this case on the grounds that somehow the ruling by the New York State Court of Appeals misinterpreted or conflicted with a so-called "doctrine" of "purposeful avoidance of the truth" as fleetingly referred to in the Harte-Hanks Communications case and in Masson v. New Yorker Magazine, Inc., 960 F.2d 896 (9th Cir. 1992). This theory has no basis in fact or law.

The New York Court of Appeals followed the teachings of this Court in determining that Johnston, a noted and respected book author, did not entertain serious doubts as to the truth of what she was told by her direct source Captain Harry Hoglander ("Hoglander"), nor did she ignore or purposely avoid the truth of

what she was about to publish. The Court determined that the statements by James Freund ("Freund") were not sufficiently decisive or clear, so that they obliged Johnston to speak to additional sources as to the truth of what she was about to write and have published.

Freeman would have this Court adopt a standard different from all the cases announced by this court in the wake of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) by stating that if there is any possible conflict between information obtained by two sources, the journalist is obliged to seek out other, additional sources for verification. That is not and never has been the standard of "actual malice," in the constitutional sense, as adopted by this Court. Freeman would, in effect, have this Court adopt a negligence standard when public figures sue book

publishers concerning matters of public interest. This Court should not consider such a sea-change in the constitutionalization of libel law as interpreted over the past thirty years, particularly on the facts of this case.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

A fair reading of Freeman's Petition discloses that, like so many unsuccessful litigants, he merely wants to have another appellate court hear and consider his argument that he has sufficient evidence of "actual malice" in the constitutional sense (hereinafter characterized as "constitutional malice") to proceed to a jury. His confusing and often inarticulate attempt to formulate some federal, constitutional question (which then may conflict with this Court's opinion in Harte-Hanks) is unavailing. It is clear from the precise, articulate wording of a unanimous seven-judge court below that the scope and contours of the constitutional malice standard were fully understood and properly applied by that court.

A. Misstatement of the Record Below

The Petition's recitation of the factual record below surprisingly omits certain of Johnston's sources and certain steps taken by her to verify the statement about Freeman. Petitioner instead focuses on an isolated statement from Freund and a parenthetical comment from Johnston's research assistant that, according to petitioner, should have created serious doubts in Johnston's mind so that she was obligated to seek out additional sources for verification. (Petition, pp. 4-9).

In point of fact, Johnston spoke on several occasions to Hoglander who gave Johnston almost the exact statement about Freeman as appeared in the book Takeover: The New Wall Street Warriors: The Men, The Money, The Impact (the "Book"). (A-113).[1]

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[1] References preceded by "A-" are to Plaintiff-Appellant's Appendix in the Court of Appeals.

Hoglander told Johnston that Freeman warned the TWA Board that selling TWA to Frank Lorenzo "would provoke night time trashing of airplanes and other sabotage" by the machinists union which Freeman represented as a lawyer. (A-93). That statement had also been published in the pilots' union newsletter, prior to Johnston writing the Book. Hoglander was not some hearsay, second-hand source; he was an eyewitness, first-hand source to Freeman's statement at the Board meeting. (A-122-23).

Petitioner conveniently omits in his Petition the facts that Hoglander's statement had been previously published in the pilot's newsletter and that Johnston showed the completed manuscript to Freund - several months after Freund made the so-called contradictory statements. (A-127). Not only did Freund read the manuscript,

but he suggested changes to the exact same paragraph of which Freeman complains. (A-193). Freund did not suggest a single alteration to the sentence of which Freeman complains. (Id.) This approval by Freund of the sentence concerning Freeman is fully consistent with the New York State Court of Appeals' view of Freund's allegedly contradictory statement made in the interview several months before:

> We reject plaintiff's contention. Plaintiff's analysis is flawed because no clear and convincing evidence exists indicating that Hoglander's view of plaintiff's statement of the meeting was contradicted by Freund's statement, the latter statement appearing equivocal at best (See, Mahoney v. Adirondack Publ. Co., 71 N.Y.2d 31, 40, 523 N.Y.S.2d 480, 517 N.E.2d 1365, supra). Perhaps most telling is Freund's admission that he could not

> "remember exactly what [plaintiff] said." Moreover, Freund's opinion that it was "no big deal" may refer to any number of considerations: that Hoglander expressed the same sentiment as plaintiff and therefore had lessened the impact of plaintiff's statement; that Freund was genuinely unimpressed by plaintiff; or that plaintiff's words, in Freund's view, did not sway the Board in either direction. Given these different possible interpretations, no rational finder of fact could, in this case, find actual malice by clear and convincing evidence.

Freeman, 84 N.Y.2d at 57-58; 614 N.Y.S.2d at 379-380 (emphasis supplied).

Despite the view of all seven judges in the court below that the statement was "equivocal at best," Petitioner surprisingly states that "Freund unambiguously disputed Hoglander's

characterization of Freeman's remarks at the August 20th board meeting." (Petition, p. 5).

Petitioner's entire argument here is premised on the Court's ignoring the conclusion by the unanimous court below that Freund's comment was "equivocal", vague, and ambiguous. Because without a definitive, clear statement by Freund to Johnston that Hoglander's recollection of Freeman's statement at the Board meeting was incorrect, then by any constitutional measure, Johnston could not possibly have recklessly disregarded the truth of Hoglander's oral and published version of what happened at the Board meeting.

This Court should not, and under its Rules cannot, be second-guessing state appellate courts on interpretations of factual records, unless the results of those state court rulings adversely

implicate constitutional rights. See N.L.R.B. v. Pittsburgh Steamship Co., 340 U.S. 498, 502-503 (1951). Here, Freeman has no constitutional right to continue a libel suit, a creature of state law, after a state court of last resort had found that the factual record could not support a finding by a jury of reckless disregard of the truth by clear and convincing evidence. The court below held that Freeman "demonstrates neither falsity . . . nor a reckless disregard for the truth." Freeman, 84 N.Y.2d at 58, 614 N.Y.S.2d at 380. In addition, the New York Court of Appeals "agree[d] with the Appellate Division that the statement, in the context in which it was allegedly made, is not susceptible to the defamatory meaning that plaintiff supported illegal acts of sabotage if the negotiation was not concluded as he wished." Freeman, 84

N.Y.2d at 59; 614 N.Y.S.2d at 380. This holding represents an alternative, non-constitutional ground for dismissal, which permits the Court to avoid addressing the arguable constitutional basis for this Petition.

B. The Court Below Properly Construed The Constitutional Malice Standard

In his desperate effort to generate some kind of federal question to permit this Court to hear this case under Rule 10, Petitioner focuses on the words "purposeful avoidance of the truth" from the Harte-Hanks opinion, seeking to expand that wording into the sole definition of the "reckless disregard" prong of the constitutional malice standard. Petitioner distorts this Court's opinion in Harte-Hanks and then ignores the Court's later opinion in Masson to create some "unsettled" question of federal law. There is no uncertainty or unclarity in

the Court's formulation and definition of the constitutional malice standard. The standard is well-known and well-understood by federal and state judges across the land. Disagreements arise in the application of that standard to particular facts in each case. The fact that Freeman continues to disagree with the legal conclusions of seven New York Court of Appeals judges does not, ipso facto, create an unsettled federal question.

In the wake of this Court's formulation of the constitutional malice standard (i.e., "knowledge of falsity or a reckless disregard for the truth") in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court almost immediately began to struggle with the meaning of the term "reckless disregard for the truth". In Garrison v. Louisiana, 379 U.S. 64, 74, (1964), the Court said that to meet the

reckless disregard standard, the plaintiff must present evidence to permit the conclusion that the defendant actually had a "high degree of awareness of ... probable falsity." Four years later in St. Amant v. Thompson, 390 U.S. 727, 731 (1968), this Court continued its exploration of what would constitute reckless disregard of the truth: "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The Court went on to state that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Id. at 732.

However, this Court stated that the term "reckless disregard" "cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication...." Id. at 730.

Those definitional terms of "high degree of awareness of probable falsity," "entertained serious doubts", and "obvious reasons to doubt" have been repeated and invoked since 1968 in nearly every libel case involving the issue of the existence of constitutional malice. (The opinion of the court below was no exception.) Certainly, this Court's opinion in Harte-Hanks primarily relied on these definitional terms in discussing the meaning of constitutional malice. 491 U.S. at 688. In discussing the evidence of what the journalist did in Harte-Hanks, this court said in passing: "Although

failure to investigate will not alone support a finding of actual malice, see St. Amant, 390 U.S. at 731, 733, the purposeful avoidance of the truth is in a different category." 491 U.S. at 692. The Court, however, did not declare "purposeful avoidance of the truth" to be a separate and independent standard or indeed, an alternative standard. It did not even use that wording when discussing the meaning of the term "reckless disregard" four pages earlier in the opinion.

Furthermore, this Court did not even refer to that sentence about "purposeful avoidance" when it discussed the meaning of constitutional malice two years later in Masson v. New Yorker Magazine, Inc., __ U.S. __, 111 S.Ct. 2419 (1991).

Upon remand in Masson, the United States Court of Appeals for the Ninth

Circuit explicitly followed Harte-Hanks in stating that to overcome a summary judgment, a public figure libel plaintiff "must establish by clear and convincing evidence that the publisher of an allegedly defamatory book or article 'in fact entertained serious doubts as to the truth of his publication.'" Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 899-900 (9th Cir. 1992). The Ninth Circuit, having adopted the "serious doubt" wording of this Court as the overall test, stated that that standard could be met in two ways: (1) demonstrate the publisher had "a high degree awareness of probable falsity"; or (2) the publisher had "obvious reasons to doubt the veracity" of the facts and the publisher "failed to take reasonable steps to dispel those doubts." 960 F.2d at 900. The Ninth Circuit's reliance on the words

"purposeful avoidance of the truth" only came into play when discussing whether reasonable steps were taken to dispel pre-existing, obvious doubts.

Comparing the Ninth Circuit's analysis in Masson of the definition of "reckless disregard" with the New York Court of Appeals' opinion here, reveals no possible conflict between Masson and Freeman. The Ninth Circuit referred to the "entertained serious doubts" test as the primary, overall definition of "reckless disregard". Similarly, the New York Court of Appeals only refers to the "entertained serious doubts" definition in exploring the "reckless disregard" standard. 84 N.Y.2d at 58; 614 N.Y.S.2d at 380. Petitioner's convoluted interpretations of the Harte-Hanks and Ninth Circuit's Masson opinion do not make sense when these two opinions are

compared. Petitioner talks about a "two part purposeful avoidance analysis," whereas the Ninth Circuit Masson opinion never refers to such a test. In short, there is no uncertainty among lower courts; there is no unsettled law.

CONCLUSION

The petition for a writ of certiorari should be denied in all respects.

Dated: October 28, 1994

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